estopped by a judgment might have avoided the estoppel by introducing other evidence,[3] and estoppels by deed and *in pais* are admittedly most valuable when they prevent a party from setting up actual facts.

This being the nature of estoppel, there are two possible views of the effect of a judgment based on an estoppel. The first is that it merely affirms the existence of the estoppel and enforces it as a bar against any attempt to set up the facts. But if the decree of 1898 merely affirmed that the existence of the judgment of 1896 existed as an estoppel and precluded the plaintiff from asserting that the contract was revocable, it would be clearly competent in the new trial for the plaintiff, while conceding the correctness of the decree which decided that an estoppel then existed, to show that since 1898 the estoppel had been removed by the reversal of the judgment.[4] The principal case can then be sustained only on a second theory, namely, that in dealing with a former judgment a court regards it not merely as preventing the questioning of certain facts, but as conclusive evidence of their actual existence; that the federal decree of 1898 not only asserted the existence and conclusiveness of the judgment of 1896 as an estoppel, but asserted further the correctness of that judgment as a judgment on the merits, so that the decree of 1898 was an independent adjudication that the Hewitt law actually constituted an irrevocable contract. This view is fictitious, for to affirm that a judgment based on an estoppel establishes the facts, but only between the parties, is in effect to admit that it does not establish the facts at all. Furthermore, as is frequently the case when fictions are consistently adhered to, it leads to consequences undesirable from a practical standpoint, as is illustrated by the decision of the principal case.

Liability of National Banks Acquiring Shares in a Partnership. — National banks, although given great freedom as to the kinds of security that they may take for already existing loans, may nevertheless be subjected to some restrictions. A national bank in a recent case accepted as security nine of the forty transferable shares of a partnership. In the course of realizing on this security the bank accepted a transfer of the shares and participated in the management of the partnership. Debts were contracted and the partnership became insolvent. It was attempted to hold the bank liable for such debts as a partner, thus subjecting it to the burden of the insolvency of other partners. The court held, however, that the bank, though able to own the shares, had no capacity to become a partner. The bank, however, was held to have become a part owner of the partnership property, such ownership being in its nature several, and was held liable for its proportional share of the debts in question but no more. *Merchants' National Bank* v. *Wehrmann*, 68 N. E. Rep. 1004 (Oh.).

If the court is right in saying that the bank had capacity to hold and did hold title to the shares, it would follow that the bank became in all respects a partner, for from the nature of the shares that is a necessary consequence of their ownership. Although a corporation is generally held to lack capacity to form a partnership,[1] it may become a partner if the char-

---

[3] *Cf.* Chicago Theological Seminary *v.* People, 189 Ill. 439.

[4] *Cf. In re* Anglo-French, etc., Society, 14 Ch. D. 533.

[1] Aurora State Bank *v.* Oliver, 62 Mo. App. 390; Whittenton Mills *v.* Upton, 10 Gray (Mass.) 582.

ter so authorizes.[2] The question therefore is what powers were conferred on the bank in this case. The national banking act allows national banks to do business incidental to banking.[3] This might be construed to allow a bank to become a partner when according to the ordinary methods of that business such a course is necessary to realize on securities. Similarly a bank taking shares in another bank to collect a debt, becomes liable as a shareholder.[4] But to allow a bank to become a partner is going considerably farther because the bank is thus subjected to unlimited liability for partnership debts. The capacity to enter a partnership is so rarely conferred upon a corporation and is so dangerous to the safety of banks that the presumption against such capacity is very strong. The general words of this statute are hardly sufficient to grant so unusual a power.

If the bank could not become a partner it would follow that it had no capacity to own the shares. If therefore the capacity were lacking, the attempted transfer was not effective to pass title. Similarly an *ultra vires* purchase of stock in another bank has been held to give the purchasing bank no title.[5] The better view is, therefore, that the bank, having no title, incurred no liability for any partnership debts.

The view of the principal case is an illogical compromise between the two views suggested and is unsupported by authority. The idea of a several ownership of an undivided nine-fortieths interest is a conception difficult to grasp and apparently an innovation in the law.

CANCELLATION OF INSTRUMENTS ON WHICH ACTION AT LAW IS PENDING. — Although it is now almost universally held that fraud may be pleaded in bar of actions at law on written instruments, yet equity commonly gives the relief of compulsory surrender and cancellation.[1] Where there is an action at law already pending, however, the courts of equity are not agreed as to whether it is advisable to interfere. In those jurisdictions where by statute a defendant at law may compel his opponent to prosecute his action to a judgment, the rule of the United States Supreme Court[2] would seem to be adequate. Here the bill is simply dismissed, the suit at law being regarded as means sufficient to bring about justice between the parties. A recent decision of the United States Supreme Court rests on this view of the case. *Cable* v. *United States Life Insurance Co.*, 24 Sup. Ct. Rep. 74.

In jurisdictions where the defendant at law is not protected by the statute mentioned above, the question is more difficult. If the plaintiff at law fails to prosecute his action to a judgment, the plaintiff in equity is in no better position than he would have been if no action at law had been brought. Influenced by this view of the case, a number of jurisdictions allow the bill, enjoin the action at law, and decree the relief if it is warranted on the hearing.[3] It is obvious, however, that such a proceeding

---

[2] Butler *v.* American Toy Co., 46 Conn. 136.
[3] U. S. Comp. Sts. 1901, § 5136.
[4] National Bank *v.* Case, 99 U. S. 628.
[5] California Bank *v.* Kennedy, 167 U. S. 362.

[1] Fuller *v.* Percival, 126 Mass. 381. *Contra*, Allerton *v.* Belden, 49 N. Y. 373.
[2] Grand Chute *v.* Winegar, 15 Wall. (U. S.) 373.
[3] Metler's Administrators *v.* Metler, 18 N. J. Eq. 270.